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Jimmy Seah Thian Heng & Ors v Public Prosecutor

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HIGH COURT (JOHOR BAHRU) — CRIMINAL APPLICATION NOS JA-44–39–04 OF 2018, JA-44–44–05 OF 2018, JA-44–48–06 OF 2018, JA-44–51–07 OF 2018 AND JA-44–56–08 OF 2018
COLLIN SEQUERAH J
6 SEPTEMBER 2018

C

Criminal Procedure — Bail — Granting of — Persons who could be released on bail under s 13(2) of the Security Offences (Special Measures) Act 2012 — Whether applicants qualified as 'sick or infirm' persons under s 13(2) to be granted bail — Whether medical evidence produced and averments made by applicants in their affidavits as to their state of health deemed to be admitted as prosecution had not rebutted them

D

Statutory Interpretation — Construction of statutes — Ambiguity — Security Offences (Special Measures) Act 2012 ('SOSMA'), s 13(2) — Whether literal reading of s 13(2) meant court had no discretion to grant bail unless Public Prosecutor ('PP') had first applied for electronic monitoring device ('EMD') to be attached to the bail applicant — Whether discretion to grant bail always resided in the court and could not by legislation be removed from it and vested with the PP as that would infringe art 121 of the Federal Constitution — Whether literal interpretation of s 13(2) created an absurdity and rendered right to bail illusory as PP would never apply for accused to be released on bail — Whether explanatory note to Bill of the Act supported construction that PP's application for attachment of the EMD could only be made if court had exercised discretion to grant bail

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The applicants were charged under s 130V(1) of the Penal Code for being members of an organised criminal group. The offence fell under the First Schedule to the Security Offences (Special Measures) Act 2012 ('SOSMA'). The instant applications by the applicants were for bail under s 13 of SOSMA on the ground they were 'sick or infirm persons'. Section 13(2) of the SOSMA provided that a person aged below 18 years, a woman or a sick or an infirm person may be released on bail 'subject to an application by the Public Prosecutor that the person be attached with an electronic monitoring device in accordance with the Criminal Procedure Code'. The questions before the court were whether: (a) bail could only be granted if there was first an application by the public prosecutor ('PP') for an electronic monitoring device ('EMD') to be attached to the person seeking bail or whether the granting of bail was always within the court's discretion regardless whether the PP had made an application for the EMD; or not (b) if the court had discretion to grant bail in

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any event, whether, on the facts, the applicants qualified for bail.

Held, granting each of the first four applicants bail in the sum of RM20,000 secured by two sureties with the condition that they surrender their international passports to the court and report themselves to the police station nearest their usual place of residence once in two weeks; and dismissing the bail application of the fifth applicant, Chua Kah Tat:

(1) Under s 13 of the SOSMA, the courts had the discretion to decide whether to grant bail or not to any of the classes of persons enumerated in s 13(2). If discretion was exercised to grant bail, the court could then impose whatever conditions of bail it deemed fit including (when s 388A of the Criminal Procedure Code eventually came into force) considering an application from the public prosecutor for the attachment of the EMD. Should the PP decide not to apply for the EMD, the court could nevertheless proceed to grant bail on whatever other terms and conditions. This interpretation was consonant with the principle that a man was innocent until proven guilty and that in interpreting a penal provision, any doubt therein had to be given to the accused (see paras 62–64).

(2) A literal reading of s 13 would give the result that unless the PP applied for the EMD to be attached, the court had no discretion to grant bail. That would amount to removing the discretion of the courts to grant bail and placing such discretion in the hands of the PP. Any provision that sought to remove from the court its discretion to grant bail and vest it in the hands of the PP was contrary to art 121 of the Federal Constitution and could not be countenanced. It was also a presumption of statutory interpretation that statutes should be construed as far as possible to avoid absurdity. Since it was highly unlikely that the PP would, of his own accord, apply for bail on behalf of an accused person, the right to bail under s 13 would be rendered illusory. To avoid such a manifest absurdity, the provision had to be construed as retaining in the court the discretion to grant bail. The explanatory note to the Bill of the Act also envisaged a situation where after the court had exercised its discretion to grant bail (or otherwise), the PP then might apply for the attachment of the EMD (see paras 17–18, 24–26 & 43).

(3) With regard to the applications made by the first four applicants herein, there was no rebuttal from the respondent to the averments raised by the applicants. From a perusal and consideration of the medical reports exhibited by the applicants, they would qualify to be 'sick' persons within the meaning of s 13(2) and their applications for bail were therefore allowed. However, the complaints advanced by the fifth applicant, Chua Kah Tat, largely concerned discomfort and pain in his bones and joints. His complaints were not something that would cause him to be described

as a 'sick or infirm person' within the meaning of s 13(2). His application for bail was therefore dismissed (see paras 74–75, 78–79, 86–88, 94–95, 99, 102–103 & 110–111).

[Bahasa Malaysia summary

Pemohon-pemohon dituduh di bawah s 130V(1) Kanun Keseksaan kerana menjadi ahli kumpulan jenayah yang terancang. Kesalahan terangkum di bawah Jadual Pertama Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012 ('SOSMA'). Permohonan-permohonan ini oleh pemohon-pemohon adalah untuk ikat jamin di bawah s 13 SOSMA atas alasan mereka adalah 'sick or infirm persons'. Seksyen 13(2) SOSMA memperuntukkan bahawa seseorng yang berumur di bawah 18 tahun, seorang perempuan atau sakit atau seorang yang lemah mungkin dilepaskan atas jaminan 'subject to an application by the Public Prosecutor that the person be attached with an electronic monitoring device in accordance with the Criminal Procedure Code'. Soalan-soalan di hadapan mahkamah adalah sama ada: (a) ikat jamin hanya boleh diberikan jika pertamanya terdapat permohonan oleh pendakwa raya ('PR') untuk peranti pengawasan elektronik ('EMD') digunakan kepada orang yang memohon ikat jamin atau sama ada pemberian ikat jamin adalah selalunya dalam budi bicara mahkamah tanpa mengambil kira sama ada PR telah membuat permohonan untuk EMD; atau tidak (b) jika mahkamah mempunyai budi bicara untuk memberikan ikat jamin walau bagaimanapun, sama ada, atas fakta, pemohon-pemohon layak untuk jaminan.

Diputuskan, memberi setiap keempat-empat pemohon pertama ikat jamin dalam jumlah RM20,000 dijamin oleh dua penjamin dengan syarat yang mereka menyerahkan pasport antarabangsa mereka kepada mahkamah dan melaporkan diri mereka di balai polis berdekatan tempat tinggal biasa mereka sekali dalam dua minggu; dan menolak permohonan ikat jamin oleh pemohon kelima, Chua Kah Tat:

(1) Di bawah s 13 SOSMA, mahkamah-mahkamah mempunyai budi bicara untuk memutuskan sama ada memberikan ikat jamin atau tidak kepada mana-mana kelas orang-orang yang disebut dalam s 13(2). Jika budi bicara dijalankan untuk memberikan ikat jamin, mahkamah boleh kemudiannya mengenakan apa-apa syarat-syarat ikat jamin yang ia anggap wajar termasuk (apabila s 388A Kanun Tatacara Jenayah akhirnya berkuat kuasa) mempertimbangkan permohoan daripada PR bagi penggunaan EMD. Sekiranya PR memutuskan untuk memohon bagi EMD, mahkamah walau bagaimanapun boleh meneruskan memberi ikat jamin atas apa-apa terma-terma dan syarat-syarat lain. Tafsiran ini adalah konsonan dengan prinsip bahawa seseorang adalah tidak bersalah sehingga dibuktikan bersalah dan dalam menntafsirkan peruntukan penal, apa-apa keraguan di dalamnya perlu diberikan kepada tertuduh (lihat perenggan 62–64).

(2) Pembacaan literal s 13 akan memberikan keputusan kecuali PR memohon bagi EMD digunakan, mahkamah tidak mempunyai budi bicara untuk memberikan ikat jamin. Ini akan merupakan kepada menolak budi bicara mahkamah-mahkamah untuk memberikan ikat jamin dan meletakkan budi bicara sedemikian dalam tangan PR. Apa-apa peruntukan yang memohon untuk menolak daripada mahkamah budi bicaranya untuk memberi ikat jamin dan meletakhakkannya dalam tangan PR adalah bertentangan kepada perkara 121 Perlembagaan Persekutuan dan tidak boleh dipertimbangkan. Ia juga anggapan tafsiran statutori bahawa statut patut ditafsirkan sejauh mungkin untuk mengelak tidak munasabahnya. Memandangkan ia adalah amat tidak mungkin yang PR akan, dengan sendirinya, memohon untuk ikat jamin bagi pihak tertuduh, hak kepada ikat jamin di bawah s 13 akan menjadi khayalan. Untuk mengelak tidak munasabah nyata sedemikian, peruntukan perlu ditafsirkan sebagai mengekalkan di mahkamah budi bicara untuk memberi ikat jamin. Nota penjelasan kepada Bil Akta juga menyatakan keadaan di mana selepas mahkamah telah menjalankan budi bicaranya untuk memberikan ikat jamin (atau sebaliknya), PR kemudiannya mungkin memohon bagi penggunaan EMD (lihat perenggan 17–18, 24–26 & 43).

(3) Berkenaan permohonan-permohonan yang dibuat oleh keempat-empat pemohon pertama di sini, tidak terdapat pematahan daripada responden kepada penegasan-penegasan yang dibangkitkan oleh pemohon-pemohon. Daripada penelitian dan pertimbangan laporan perubatan yang dilampirkan oleh pemohon-pemohon, mereka adalah layak untuk menjadi orang-orang 'sick' dalam maksud s 13(2) dan permohonan-permohonan mereka untuk ikat jamin oleh itu dibenarkan. Walau bagaimanapun, aduan-aduan yang dikemukakan oleh pemohon kelima, Chua Kah Tat, sebahagian besarnya berkenaan ketidakselesaan dan kesakitan tulang dan sendinya. Aduannya adalah sesuatu yang tidak akan menyebabkannya diterangkan sebagai 'sick or infirm person' dalam maksud s 13(2). Permohonannya untuk ikat jamin oleh itu ditolak (lihat perenggan 74–75, 78–79, 86–88, 94–95, 99, 102–103 & 110–111).]

Notes

For cases on ambiguity, see 11(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1905–1908.

For cases on granting of bail, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1261–1286.

Cases referred to

Chow Lin Choy lwn Pendakwa Raya [2010] 9 MLJ 813, HC (refd)

Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29; [1984] 1 CLJ 28, FC (refd)

Flora v Wakom (Heathrow) Ltd [2006] 4 All ER 982; [2006] EWCA Civ 1103, CA (refd)
Hari Bhadur Ghale v PP [2012] 6 MLJ 597, FC (refd)
Khagendra Nath Bayan And Anor v The State of Assam 1982 CriLJ 2109, HC (refd)
Liyanage v R [1967] 1 AC 259, PC (refd)
Ng Hee Thong & Anor v Public Bank Bhd [1995] 1 MLJ 281, CA (refd)
Ooi Chee Tiong v Pendakwa Raya [2017] MLJU 439; [2016] 1 AMR 702; [2016] 2 CLJ 678, HC (refd)
PP v Dato' Balwant Singh (No 1) [2002] 4 MLJ 427, HC (refd)
PP v Dato' Yap Peng [1987] 2 MLJ 311; [1987] 1 CLJ 550, SC (refd)
PP v Kok Wah Kuan [2008] 1 MLJ 1; [2007] 6 CLJ 341, FC (refd)
PP v Lee Ngan Chea [2015] 6 CLJ 117, HC (refd)
Secretary of State for Defence and another v Guardian Newspapers Ltd [1985] AC 339, HL (refd)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561, FC (folld)
Teoh Li Wah v PP [2015] MLJU 946; [2015] 4 AMR 959, HC (not folld)
Zareefa v State 2004 CriLJ 4088, HC (refd)

Legislation referred to

Arms Act 1960 s 8
Federal Constitution arts 5, 9, 10, 13, 121, 121(1), 122B, 149
Criminal Procedure Code ss 388, 388A
Firearm (Increased Penalty) Act 1971 s 8
Land Acquisition Act 1960 s 40D
Penal Code s 130V(1), Chapters IVB, VIA, VIB
Special Measures Against Terrorism in Foreign Countries Act 2015
Security Offences Special Measures Act 2012 s 13, 13(1), (2), First Schedule

Muhammad Shafee Abdullah (Muhammad Farhan Shafee and Wee Yeong Kang with him) (Shafee & Co) in Criminal Application No JA-44–51–07 of 2018 for the first applicant.
Freda Josephine Gonzales (Freda Sabapathy & Co) in Criminal Application No JA-44–44–05 of 2018 for the second applicant.
Mohd Daud Ismail (Mohd Zamri bin Mohd Idrus with him) (Daud & Co) in Criminal Application No JA-44–39–04 of 2018 for the third applicant.
Ahmad Ishrakh bin Saad (Ishrakh Saad & Co) in Criminal Application No JA-44–48–06 of 2018 for the fourth applicant.
Freda Josephine Gonzales (Freda Sabapathy & Co) in Criminal Application No JA-44–56–08 of 2018 for the fifth applicant.
Roslan Mat Nor (Suhaila bt Shafi'uddin) (Deputy Public Prosecutor, Johor State Legal Advisor) for the respondent.

Collin Sequerah J:

INTRODUCTION

[1] These are all applications for bail on behalf of the applicants abovenamed. The applicants are charged under s 130V(1) of the Penal Code for being members of an organised criminal group. Section 130V(1) is under Chapter VIB of the Penal Code.

[2] The offence thus falls under the First Schedule to the Security Offences Special Measures Act 2012 (Act 747) ('the SOSMA') which reads as follows:

> First Schedule (Section 3)
>
> SECURITY OFFENCES
>
> Penal Code [Act 574]:
>
> (i) Offences under Chapter VI
>
> (ii) Offences under Chapter VIa
>
> (iii) Offences under Chapter VIB
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> Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 [Act 670]: Offences under Part III a Special Measures Against Terrorism in Foreign Countries Act 2015 [Act 770].

[3] Bail under the SOSMA is governed by s 13 which reads:

> 13 Bail
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> (1) Bail shall not be granted to a person who has been charged with a security offence.
>
> (2) Notwithstanding subsection (1) —
>
> (a) a person below the age of eighteen years;
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> (b) a woman; or
>
> (c) a sick or an infirm person,
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> charged with a security offence, other than an offence under Chapter VIA of the Penal Code [Act 574] and the Special Measures Against Terrorism in Foreign Countries Act 2015 [Act 770], may be released on bail subject to an application by the Public Prosecutor that the person be attached with an electronic monitoring device in accordance with the Criminal Procedure Code.

ISSUES

[4] The issues that fall to be determined are the following:

(i) whether on the wordings of s 13 of the SOSMA, bail can only be granted if the public prosecutor ('PP') first applies for an electronic monitoring

device ('EMD') to be attached to the person seeking bail or is the court vested with a discretion to grant bail notwithstanding the fact that there is no application by the PP to attach an EMD to the person seeking bail? and

(ii) if the answer to (i) is that the court is vested with the discretion to grant bail notwithstanding the fact that there is no application by the PP to attach an EMD to the person seeking bail, whether on the facts, the applicants fall within the categories of persons under s 13(2) in respect of which bail may be granted?

ANALYSIS AND DECISION

[5] The task facing this court is one of interpretation of the wordings in s 13 of the SOSMA. It is therefore a matter of statutory interpretation. It is to be noted that upon a plain and literal reading of the section, it appears that bail can only be granted if the PP applies for an EMD to be attached to the person applying for bail.

[6] This can be gathered from the concluding words of sub-s (2) as follows:

... may be released on bail subject to an application by the Public Prosecutor that the person be attached with an electronic monitoring device in accordance with the Criminal Procedure Code.

[7] This interpretation also raises the issue of whether the wordings of the said section removes the discretion to grant bail from the court and places it instead within the discretion of the PP?

ARTICLE 149 OF THE FEDERAL CONSTITUTION

[8] In the course of their submission, it was contended by the respondent that the provisions of the SOSMA were made under art 149 of the Federal Constitution ('the Constitution') which reads:

149 Legislation against subversion, action prejudicial to public order, etc

(1) *If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation —*

(a) *to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property; or*

(b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or

(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or

(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or

(e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or

(f) *which is prejudicial to public order in, or the security of, the Federation or any part thereof,*

any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

(2) A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed, cease to have effect if resolutions are passed by both Houses of Parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power of Parliament to make a new law under this Article. (Emphasis added.)

[9] The preamble to the SOSMA is set out as follows:

WHEREAS action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia —

(1) to cause, or to cause a substantial number of citizens to fear, *organized violence against persons or property*;

(2) to excite disaffection against the Yang di-Pertuan Agong;

(3) *which is prejudicial to public order in, or the security of, the Federation or any part thereof; or*

(4) to procure the alteration, otherwise than by lawful means, of anything by law established; (Emphasis added.)

[10] It was thus contended that the SOSMA is a special piece of legislation which is valid notwithstanding that it is inconsistent with any of the provisions of arts 5, 9, 10 or 13 of the Constitution. These articles concern the fundamental liberties of a citizen of this country.

SECTION 13 OF THE SOSMA

[11] An examination of the wordings of s 13(1) of the SOSMA indicates that the general rule is that no bail may be granted in respect of a person charged with a security offence. Thus bail is denied to persons charged with such offences which effectively means the offence is unbailable.

[12] However, in sub-s (2), there are three categories of persons who may be granted bail notwithstanding sub-s (1). This exception means that in the case of these categories of persons, the offence is now rendered non-bailable.

[13] The section however goes on to stipulate that such categories of persons except those who are charged with an offence under Chapter VIA of the Penal Code (Act 574) and the Special Measures Against Terrorism in Foreign Countries Act 2015 (Act 770), may be released on bail subject to an application by the public prosecutor that the person be attached with an electronic monitoring device in accordance with the Criminal Procedure Code.

[14] So, apart from those categories of persons who are absolutely prohibited from a right to bail, namely, those charged under Chapter VIA of the Penal Code (Act 574) and the Special Measures Against Terrorism in Foreign Countries Act 2015 (Act 770), there is prima facie a right to bail for the three categories of person mentioned in sub-s 2.

[15] The relevant question that arises for determination now is whether the concluding part of the section relating to an application by the PP that the person be attached with an EMD ought to be construed to be a condition precedent, as contended by the respondent, or merely a permissive stipulation after the court has exercised its discretion to grant bail, as contended by the applicants.

RULES OF STATUTORY INTERPRETATION

[16] A succinct summary of the rules relating to statutory interpretation was set out in the Federal court case of *Hari Bhadur Ghale v Public Prosecutor* [2012] 6 MLJ 597, by Richard Malanjum CJ (Sabah and Sarawak) as His Lordship the now Chief Justice of Malaysia, then was as follows:

> ... it is necessary to revert to some basic principles or canons of statutory interpretation.
>
> [12] Firstly, the object of statutory interpretation is to determine what the words of a statutory provision mean. It may be, inter alia, either by way of strict literal meaning, ordinary and natural meaning, the golden rule, the purposive approach (mischief rule), the value-based approach or the ejusdem generis rule.
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> [13] Secondly, where the words are unambiguous, plain and clear they must be given their natural and ordinary meanings. 'It is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient or even unjust or immoral' (see *Public Prosecutor v Sihabduin bin Hj Salleh & Anor* [1980] 2 MLJ 273; *Tan Weng Chiang v Public Prosecutor* [1992] 2 MLJ 625). Further, it should be borne in mind the 'dictum that one should not 'twist and outstretch the language beyond its common usage', (see *Cheong Seok Leng v Public Prosecutor*

A [1988] 2 MLJ 481; (also [1988] SLR 565)).

[14] Thirdly, 'that the words used in a section must be given their plain grammatical meaning'. It is also an important rule that a statute should be construed as a whole. Where the court is dealing with two sub-sections of a section, *'it is necessary that the two sub-sections must be construed as a whole 'each portion throwing light if need be on the rest'. The two sub-sections must be read as parts of an integral whole and as being inter-dependent'. It is not legitimate for the court to rewrite the subsections* (Emphasis added.) (see *Madanlal Fakirchand Dudhediya v Shree Changdeo Sugar Mills Ltd & Ors AIR* 1962 SC 1543; *NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd* [1987] 1 MLJ 39).

C [16] Fourthly, 'that not just a single rule of interpretation should be contemplated, pursued and employed in interpreting any statute to the exclusion of all others; one should test the said single rule with other rules and general presumptions wherever appropriate' (see *Kesultanan Pahang v Sathask Realty Sdn Bhd* [1998] 2 MLJ 513).

D [17] Fifthly, that in interpreting a penal provision any doubt therein should be given to the accused person.

[17] A literal reading of s 13 would indicate that unless the prosecution applies for the EMD to be attached there is no discretion for the court to grant bail.

[18] However, it is also a presumption of statutory interpretation that statutes will be construed as far as possible to avoid absurdity. If the provision is to be construed in its literal and grammatical manner, it effectively means that unless the PP first applies for an EMD to be attached, the court is powerless to exercise any discretion to grant bail.

AVOIDANCE OF ABSURDITY

[19] It is difficult if not impossible to envisage a situation where the PP on his own accord would be minded to trigger an application for bail by making an application for an EMD. Indeed, it was remarked by my learned brother Hashim Hamzah J in *Ooi Chee Tiong v Pendakwa Raya* [2017] MLJU 439; [2016] 1 AMR 702; [2016] 2 CLJ 678, in an application of a similar nature albeit with a different outcome, as follows:

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> ... it is to be noted that no right thinking prosecutor would have applied for bail on behalf of the accused person.

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[20] Therefore in order to avoid such absurdity, the provision ought to be construed in such a manner as would have the effect of retaining the discretion of the court to grant bail to the three categories of persons mentioned should it be deemed fit.

EXPLANATORY NOTES

[21] This interpretation is also consonant with the explanatory note to the Bill of the Act (very helpfully cited by learned counsel for the applicant Jimmy Seah Thian Heng) as follows:

> 13. Part V deals with the trial. There are two clauses in this part. Clause 12 provides for trial of security offences and clause 13 deals with bail. As a general rule bail shall not be granted to an accused in a security offence except if the accused falls within the exceptions of the clause. *If bail is granted under the exception, the Public Prosecutor may apply for the accused to be attached with an electronic monitoring device in accordance with the Criminal Procedure Code*. (Emphasis added.)

[22] The utility of explanatory notes as an aid to interpretation is well established. *Bennion on Statutory Interpretation* relates as follows:

> Use of explanatory memoranda
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> When a Public Bill is before Parliament, various kinds of explanatory material may be provided by the promoter of the Bill (usually the government) for the use either of members of Parliament or of ministers seeking to explain the Bill's provisions. Since these are designed to throw light on the meaning of the bill, they are of obvious relevance when the Bill has become an Act.

[23] In *Flora v Wakom (Heathrow) Ltd* [2006] 4 All ER 982; [2006] EWCA Civ 1103, it was held:

> The use that courts may make of Explanatory Notes as an aid to construction was explained by Lord Steyn in *R (Westminster City Council) v NASS* [2002] UKHL 38; [2002] 1 WLR 2956; see also *R (S) v Chief Constable of South Yorkshire Police* www.bailii.org/uk/cases/UKHL/2004/39.html [2004] UKHL 39 at [4], www.bailii.org/uk/cases/UKHL/2004/39.html [2004] 1 WLR 2196. As Lord Steyn says in the NASS case, Explanatory notes accompany a bill on introduction and are updated in light of changes to the Bill made in the Parliamentary process. They are prepared by the Government department responsible for the legislation. They do not form part of the Bill, are not endorsed by Parliament and cannot be amended by Parliament. They are intended to be neutral in political tone: they aim to explain the effect of the text and not to justify it.
>
> *The text of an Act does not have to be ambiguous before a court may be permitted to take into account an Explanatory Note in order to understand the contextual scene in which the Act is set* (NASS, para [5]). In so far as this material casts light on the objective setting or contextual scene of the statute, and the mischief to which it is aimed, it is always an admissible aid to construction. (Emphasis added.)

[24] Explanatory notes therefore can be resorted to in the course of statutory interpretation and that the provision does not have to be ambiguous before the

explanatory notes are considered. The explanatory note to the Bill therefore envisages a situation where after the court exercises its discretion to grant bail or otherwise, the PP then may apply for the attachment of the EMD.

[25] Any other construction would, in light of the fact that it is unlikely that the PP would of his own accord advance an application for bail, render the right to bail under the provision, illusory. Therefore in order to avoid a manifest absurdity, the provision must be construed as retaining the discretion of the court in this matter.

[26] There are also other compelling reasons to adopt such a construction. One such reason is that if the provision is read literally, it would amount to removing the discretion of the courts in granting bail and placing such discretion in the hands of the PP.

ARTICLE 121 OF THE FEDERAL CONSTITUTION AND THE DECISION IN SEMENYIH JAYA SDN BHD V PENTADBIR TANAH DAERAH HULU LANGAT AND ANOTHER CASE

[27] In this regard, it is apposite to refer to art 121 of the Federal Constitution ('the Constitution') and the recent Federal Court decision in the case of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561.

[28] Article 121 reads:

> Judicial power of the Federation
>
> (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely —
>
> (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and
>
> (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;
>
> (c) (Repealed)
>
> and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

[29] In *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* ('*Semenyih Jaya* case'), the provisions of art 121 of the Constitution

was discussed albeit in the context of the Land Acquisition Act 1960 ('the LAA'). A

[30] The main issue in the *Semenyih Jaya* case revolved around whether s 40D of the LAA which confers power on the assessors to decide on the amount of compensation was unconstitutional. The Federal Court held, inter alia, that s 40D of the LAA was ultra vires the Constitution and had to be struck down. B

[31] The Federal Court held that by virtue of art 121(1) of the Constitution, the power to award compensation in land reference proceedings was a judicial power that was vested in the High Court judge sitting in the land reference court. C

[32] The Federal Court also held that judicial power of the court resided in the Judiciary and no other as was explicit in art 121(1) of the Constitution. It was also held that in the superior courts, only judges appointed under art 122B of the Constitution, and no other, could exercise decision-making powers. D

[33] It continued to hold that the discharge of judicial power by non-qualified persons (and not by judges or judicial officers) or non-judicial personages rendered the said exercise ultra vires art 121 of the Constitution. E

[34] The reasoning employed by the Federal Court in the *Semenyih Jaya* case in coming to this conclusion can best be appreciated by considering the following extract from the judgement of Her Ladyship Zainun Ali FCJ as follows: F

> Judicial power is vested in the courts
>
> [66] In *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 1 MLJ 158, the Federal Court held that the provision of art 121 of the Constitution is to be read in connection with its shoulder note (which contains the words 'judicial power') and interpreted in this light. The shoulder note in a written Constitution therefore furnishes some clue as to the meaning and purpose of the article (see also *Kok Wah Kuan* (CA) and *The Bengal Immunity Company v The State of Bihar and others AIR* 1955 SC 661). G H
>
> [67] The legal consequence is that art 121(1) of the Federal Constitution states that judicial power or the power to adjudicate in civil and criminal matters brought to the court is vested only in the court. The same position was adopted in an earlier decision of the Federal Court in the dissenting view of Richard Malanjum CJ (Sabah and Sarawak) in *Kok Wah Kuan* (FC) and curiously, as did the majority of the Court of Appeal in the same case; *Kok Wah Kuan v Public Prosecutor* (CA). I
>
> [68] With respect, the majority decision of the Federal Court in *Kok Wah Kuan* (FC) appears to have given a narrow interpretation of art 121(1) of the Federal

Constitution. It held that art 121(1) of the Federal Constitution merely declares that the High Courts 'shall have such jurisdiction and powers as may be conferred by or under federal law'. At pp 14–15 of the judgment, Abdul Hamid Mohamad PCA (as he then was) stated that:

> There was thus a definitive declaration that the judicial power of the Federation shall be vested in the two High Courts. So, if a question is asked 'Was the judicial power of the Federation vested in the two High Courts?' The answer has to be 'yes' because that was what the Constitution provided. Whatever the words 'judicial power' mean is a matter of interpretation. Having made the declaration in general terms, the provision went on to say 'and the High Courts ... shall have jurisdiction and powers as may be conferred by or under federal law'. In other words, if we want to know what are the specific jurisdiction and powers of the two High Courts, we will have to look at the federal law.
>
> After the amendment, there is no longer a specific provision declaring that the judicial power of the Federation shall be vested in the two High Courts. What it means is that there is no longer a declaration that 'judicial power of the Federation' as the term was understood prior to the amendment vests in the two High Courts. If we want to know the jurisdiction and powers of the two High Courts we will have to look at the federal law. If we want to call those powers 'judicial powers', we are perfectly entitled to. But, to what extent such 'judicial powers' are vested in the two High Courts depend on what federal law provides, not on the interpretation the term 'judicial power' as prior to the amendment. That is the difference and that is the effect of the amendment. Thus, to say that the amendment has no effect does not make sense. There must be. The only question is to what extent?

[69] The narrow compass within which the Federal Court in *Kok Wah Kuan* above approached art 121(1) of the Federal Constitution suggests that the provision merely identifies the sources from which the High Courts derive their jurisdiction, namely from federal law. *Whilst it is correct to say that the powers of the High Courts to adjudicate legal disputes are those which have been conferred by federal laws, in our view the legal implication of art 121(1) extends well beyond that. In this connection, there is a general acceptance that the Federal Constitution has to be interpreted organically and with less rigidity (see the principle of law in Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29).

[70] *It is pertinent to now focus on the observation made by Richard Malanjum CJ (Sabah and Sarawak) in his judgment in Kok Wah Kuan (FC). His Lordship took the position that the specific provision on the vesting of judicial power with the High Courts in art 121(1) of the Federal Constitution represents an important feature in a democratic system of government. The courts which form the third branch of the government has a duty 'to ensure that there is a 'check and balance' in the system including the crucial duty to dispense justice according to law for those who come before them'. His Lordship observed that:*

> *At any rate I am unable to accede to the proposition that with the amendment of art 121(1) of the Federal Constitution (the amendment) the courts in Malaysia can only function in accordance with what have been assigned to them by federal laws. Accepting such proposition is contrary to the democratic system of government*

wherein the courts form the third branch of the government and they function to ensure that there is 'check and balance' in the system including the crucial duty to dispense justice according to law for those who come before them.

The amendment which states that 'the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law' should by no means be read to mean that the doctrines of separation of powers and independence of the Judiciary are now no more the basic features of our Federal Constitution. I do not think that as a result of the amendment our courts have now become servile agents of a federal Act of Parliament and that the courts are now only to perform mechanically any command or bidding of a federal law.

It must be remembered that the courts, especially the superior courts of this country, are a separate and independent pillar of the Federal Constitution and not mere agents of the federal Legislature. In the performance of their function they perform a myriad of roles and interpret and enforce a myriad of laws. Article 121(1) is not, and cannot be, the whole and sole repository of the judicial role in this country ...

[71] An astute observation on 'judicial power' was made by Eusoffe Abdoolcader SCJ in the majority judgment of *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311, where His Lordship said that:

... Judicial power may be broadly defined as the power to examine questions submitted for determination with a view to the pronouncement of an authoritative decision as to the right and liabilities of one or more parties ...

[72] It is acknowledged that it would be virtually impossible to formulate a completely exhaustive conceptual definition of that term (judicial power), whether inclusive or otherwise.

[73] The concept seems to transcend purely abstract conceptual analysis as was famously observed by Windeyer J in *The Queen v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361.

[74] *Thus it is clear to us that the 1988 Amendment had the effect of undermining the judicial power of the Judiciary and impinges on the following features of the Federal Constitution:*

(i) *the doctrine of separation of powers; and*

(ii) *the independence of the Judiciary*.

[75] *With the removal of judicial power from the inherent jurisdiction of the Judiciary, that institution was effectively suborned to Parliament, with the implication that Parliament became sovereign. This result was manifestly inconsistent with the supremacy of the Federal Constitution enshrined in art 4(1).*

Article 4(1) of the Federal Constitution provides:

This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

A [76] It is worthwhile reiterating that Parliament does not have power to amend the Federal Constitution to the effect of undermining the features as stated in (i) and (ii) above for the following reasons:

> The effect of sub-s 8(a) of the amending Act A704 appeared to establish Parliamentary supremacy; this consequentially suborned the Judiciary to
B Parliament, where by virtue of the amendment, Parliament has the power to circumscribe the jurisdiction of the High Court.

[77] Consequentially this has the unfortunate effect of allowing the Executive a fair amount of influence over the matter of the jurisdiction of the High Court.

C [78] In the past, the apex court has consistently rejected Parliamentary supremacy in giving its continuing endorsement and faint praise to the Federal Court decision in *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112, in which Tun Suffian the Lord President had, in strong terms, said that:

> The doctrine of Parliamentary supremacy does not apply in Malaysia. Here we
D have a written constitution. The power of Parliament and of state legislation in Malaysia is limited by the Constitution, and they cannot make any new law they please.

[79] And again in another case, that of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333, the Federal Court speaking through Gopal Sri Ram FCJ
E said at p 342 that:

> ... Further it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution that offends the basic structure may be struck down as
F unconstitutional. ... Suffice to say that the rights guaranteed by Part II which are enforceable in the courts form part of the basic structure of the Federal Constitution. See *Keshavananda Bharati v State of Kerala* AIR 1973 SC 1461.

[80] Sivarasa made a clear departure from an earlier Federal Court decision of *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, which in effect concluded
G that as long as an amendment to the Federal Constitution is effected in the manner required by art 159 of the Federal Constitution, that amendment was effective regardless of its effect insofar as the basic structure of the Constitution was concerned.

H [81] Thus *Sivarasa* made a frontal attack on *Loh Kooi Choon* where the Federal Court in *Sivarasa* tersely observed that:

> ... the fundamental rights guaranteed under Part II is part of the basic structure of the Constitution and that Parliament cannot enact laws (including Act amending the Constitution) that violate the basic structure. (Emphasis added.)

I [82] The authority of *Liyanage and Others v Reginam* [1966] 1 All ER 650; [1967] 1 AC 259 probably summed up the concept concisely. *The Privy Council in Liyanage held that the impugned legislation involving a usurpation and infringement by the Legislature of judicial powers is inconsistent with the written Constitution of Ceylon which, while not in terms vesting judicial functions in the Judiciary, manifested an*

intention to secure in the Judiciary a freedom from political, legislative and Executive control and in effect left untouched the judicial system established by the Charter of Justice of 1833. The legislation was struck down as void.

[83] *The Privy Council observed, inter alia, that powers in countries with written Constitutions must be exercised in accordance with the terms of the constitution from which they were derived*. Reference was made to the provisions in the Constitution for appointment of judges by the Judicial Service Commission and it was pointed out that these provisions patently displayed an intention to secure in the Judiciary a freedom from political, Legislative and Executive control. It was said that these provisions were wholly appropriate in a constitution by which it was intended that judicial power shall vest only in the judicature; and they would be inappropriate in a constitution by which it was intended that judicial power should be shared by the Executive or the Legislature.

[84] Thus given the strong observations made on the true nature and purpose of the impugned enactment, any alterations made in the judicial functions would tantamount to a grave and deliberate incursion in the judicial sphere.

[85] In fact the subsequent passage in *Liyanage* is illuminating. There the court observed that:

> ... If such Acts as these were valid the judicial power could be wholly absorbed by the legislation and taken out of the hands of the judges. It is appreciated that the Legislature has no such general intention. It was beset by a grave situation and it took grave measures to deal with it, thinking, one must presume, that it had power to do so and was acting rightly. But that consideration is irrelevant, and gives no validity to acts which infringe the Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus judicial power may be eroded. Such an erosion is contrary to the clear intention of the Constitution.

[86] Thus to put it in perspective, the judicial power of the court resides in the Judiciary and no other as is explicit in art 121(1) of the Constitution.

[87] The principles laid down in *Kesavananda Bharati v State of Kerala AIR* 1973 SC 146 were reviewed and affirmed by the Supreme Court in *Indira Nehru Gandhi v Shri Raj Narain & Anr AIR* 1975 SC 2299. The Supreme Court emphasised the sanctity of the doctrine of separation of powers and the exclusivity of judicial power. Khanne J, in concurring with the majority, inter alia, held at pp 2340–2347 that:

> ... A declaration that an order made by a court of law is void is normally part of the judicial function and is not a legislative function. Although there is in the Constitution of India no rigid separation of powers, by and large the spheres of judicial function and legislation function have been demarcated and it is not permissible for the Legislature to encroach upon the judicial sphere. It has accordingly been held that a Legislature while it is entitled to change with retrospective effect the law which formed the basis of the judicial decision, it is not permissible to the Legislature to declare the judgment of the court to be void or not binding.

[88] *The Judiciary is thus entrusted with keeping every organ and institution of the state*

within its legal boundary. Concomitantly the concept of the independence of the Judiciary is the foundation of the principles of the separation of powers.

[89] This is essentially the basis upon which rests the edifice of judicial power.

[90] *The important concepts of judicial power, judicial independence and the separation of powers are as critical as they are sacrosanct in our constitutional framework.*

[91] The concepts above have been juxtaposed time and again in our judicial determination of issues in judicial reviews. Thus an effective check and balance mechanism is in place to ensure that the Executive and the Legislature act within their constitutional limits and that they uphold the rule of law. The Malaysian apex court had prescribed that the powers of the Executive and the Legislature are limited by the Constitution and that the Judiciary acts as a bulwark of the Constitution in ensuring that the powers of the Executive and the Legislature are to be kept within their intended limit (see *Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135). (Emphasis added.)

[35] The following propositions emanate from the above passage:

(a) art 121(1) of the Federal Constitution is to be taken to read that judicial power or the power to adjudicate in civil and criminal matters brought to the court is vested only in the court;

(b) the vesting of judicial power with the High Courts in art 121(1) of the Federal Constitution represents an important feature in a democratic system of government;

(c) there is no such thing as Parliamentary supremacy in this country;

(d) the courts form the third branch of the government and they function to ensure that there is 'check and balance' in the system including the crucial duty to dispense justice according to law for those who come before them; and

(e) the superior courts of this country, are a separate and independent pillar of the Federal Constitution and not mere agents of the federal Legislature.

[36] The *Semenyih Jaya* case proceeded from the basic premise that art 121 of the Constitution must be read in conjunction with its shoulder note. The shoulder note contains the phrase 'judicial power'. Using the shoulder note as a guide, the analysis can then proceed to the next stage of inquiry which is how is the phrase 'judicial power' to be construed?

[37] The Federal Court in *Semenyih Jaya* observed that the majority decision by the Federal Court in *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1; [2007] 6 CLJ 341, adopted an unduly restrictive interpretation of the word 'judicial power' which held that the jurisdiction of the High Courts post

amendment to art 121 of the Constitution depends on what federal law provides. A

[38] The Federal Court in *Semenyih Jaya* rightly held that the Constitution has to be interpreted organically and with less rigidity as enunciated in the case of *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29; [1984] 1 CLJ 28. *Semenyih Jaya* took the position that the dissenting view of Richard Malanjum (CJ (Sabah and Sarawak)) as His Lordship the Chief Justice was then known, in *Kok Wah Kuan* was to be preferred instead. His Lordship held there that the words 'judicial power' cannot be interpreted to mean that the courts can only function with what has been assigned to them by federal laws. B C

[39] His Lordship accordingly held that the term 'federal law' post amendment in 1988 cannot be taken to mean that the doctrines of separation of powers and independence of the judiciary are now no more the basic features of the Constitution and neither does the amendment consign our courts to the mere position of being servile agents of a federal Act of Parliament. D

[40] The Federal Court in *Semenyih Jaya* also referred to the majority pronouncement of the Federal Court in *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311; [1987] 1 CLJ 550 which proved to be more all-encompassing as follows: E

> ... Judicial power may be broadly defined as the power to examine questions submitted for determination with a view to the pronouncement of an authoritative decision as to the right and liabilities of one or more parties ... F

[41] The judgement of Zakaria Yatim J (as he then was) in *Public Prosecutor v Dato' Yap Peng* at the High Court was also instructive as follows: G

> In my opinion, *the term 'judicial power' used in Article 121(1) means, to borrow the words of Griffith CJ in the Huddart's case, '... the power which every sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property*. The exercise of this power does not begin ...' until the court, which has the power to give a binding and authoritative decision is called upon to take action. *In the context of criminal law, the Court possesses the judicial power to try a person for an offence committed by him and to pass sentence against him if he is found guilty. Judicial power includes*: H
>
> (1) the power to accept a plea of guilty after the charge has been explained to the accused and he understood it, *Heng Kim Khoon v Public Prosecutor* [1972] 1 MLJ 30; *Munandu v Public Prosecutor* [1984] 2 MLJ 82; *Wong Sin Yeow v Public Prosecutor* [1968] 1 MLJ 230; and *Public Prosecutor v Jamalul Khair* [1986] 2 MLJ 371; I
>
> (2) the power to allow or refuse a plea to be retracted and that power must be

A exercised judicially, *Yeoh Eng Hock v Public Prosecutor* [1968] 1 MLJ 85;

(3) *the power to grant or refuse bail to an accused person*, *Chinnakarappan v Public Prosecutor* [1962] MLJ 234 and *Public Prosecutor v Latchemy* [1967] 2 MLJ 79 (Emphasis added.)

B

[42] The Federal Courts reference in *Semenyih Jaya* to the Privy Council's pronouncement in *Liyanage v R* [1967] 1 AC 259 in respect of countries with a written constitution such as ours was also particularly illuminating.

C **[43]** Following from the decision in the *Semenyih Jaya* case and the basic propositions derived from there, it can be surmised that any provision that seeks to remove from the court an exercise of its discretion to grant bail and vest it in the hands of the PP is contrary to the provisions of art 121 of the Constitution and cannot be countenanced.

D

[44] It is clear from the decision in the *Semenyih Jaya* case that the courts are the guardians of such sacrosanct fundamental liberties as are enshrined in the Constitution. The courts cannot thus abdicate and allow the usurpation of its role and functions just because a particular piece of legislation labelled and E packaged as 'federal law' is so designed to remove the discretion of a particular right from the courts.

[45] I had occasion to consider a similar application in the case of *Teoh Li Wah v Public Prosecutor* [2015] MLJU 946; [2015] 4 AMR 959 in the High F Court at Georgetown, Penang where I then held that on a plain and literal reading of the provisions in s 13 of the SOSMA, bail can only be considered by the court if and only if, the PP were to make a prior application for the attachment of an EMD.

G

[46] That was however, before the advent of *Semenyih Jaya*. I am constrained in the circumstances and for the reasons given above and hereunder to depart from my previous decision in *Teoh Li Wah v Public Prosecutor* in the light of the illuminating and guiding principles in *Semenyih Jaya*.

H

SECTION 388A OF THE CRIMINAL PROCEDURE CODE ('THE CPC')

[47] With particular respect to the attachment of the EMD, the concluding I part of s 13 reads, '....may be released on bail subject to an application by the Public Prosecutor that the person be attached with an electronic monitoring device in accordance with the Criminal Procedure Code'.

[48] The provision in the CPC that requires that the person granted bail be

attached with an EMD is s 388A. The said section was supposed to have been inserted vide s 7 of the Criminal Procedure Code (CPC) (Amendment) (No 2) Act 2012.

[49] However, the learned deputy public prosecutor ('DPP') Tuan Roslan very forthrightly and candidly admitted that vide PU(B) 254/2012 all sections of the CPC (Amendment) (No 2) Act 2012 had come into operation on 31 July 2012 except ss 7,8 and 9.

[50] Therefore at this point of time, s 388A is not yet in force. The inevitable result of this is that the provision regarding the application by the PP for the attachment of the EMD in s 13 of the SOSMA is of no practical utility and is rendered otiose, at least at this point of time.

[51] This gives further impetus for the argument that the court is endowed with the discretion to grant bail as it cannot be right to deny bail if bail is made to be subject to a proviso that is unenforceable in law.

CHAPTER VIB OF THE PENAL CODE

[52] Much was made by the Respondent of the fact that Chapter VIB of the Penal Code was categorised as a security offence and that the objective of doing so can be gathered from a perusal of the Hansard of 17 April 2012 and the speech of the then Minister in the Prime Ministers Department YB Dato Seri Mohamed Nazri Abdul Aziz at the Dewan Rakyat as follows :

> Rang Undang-undang Kesalahan Keselamatan (Langkah-Langkah Khas 2012) hanya memperuntukkan langkah-langkah khas untuk menangani kesalahan keselamatan. Rang undang-undang tersebut tidak membuat peruntukan mengenai jenis kesalahan yang menjadi kesalahan keselamatan. Untuk mengelakkan berlakunya kelompangan dari segi jenis kesalahan, kanun keseksaan telah dipinda bagi mewujudkan kesalahan baru bagi menangani ancaman pengganas, sabotaj, pengintipan dan aktiviti yang menjejaskan Demokrasi Berparlimen.
>
> Rang Undang-undang Kanun Keseksaan (Pindaan) 2012 ini akan melengkapi Rang Undang-undang Kesalahan Keselamatan (Langkah-Langkah Khas) 2012. Di samping itu Rang Undang-undang Kanun Keseksaan (Pindaan) 2012 ini juga akan mewujudkan suatu bab baru berkenaan dengan jenayah terancang bagi menangani kesan pengungkaian Proklamasi Darurat 1969 iaitu apabila luputnya Ordinan Darurat (Ketenteraman Awan dan Mencegah Jenayah 1969) yang diguna pakai untuk menangani jenayah terancang.
>
> Oleh yang demikian bagi maksud melindungi keselamatan negara dan ketenteraman awam dengan lebih efektif Rang Undang-undang Kanun Keseksaan (Pindaan) 2012 memperuntukkan secara amnya tiga kategori kesalahan substantif iaitu:
>
> (i) tiga belas kesalahan baru di bawah Bab IV (Kesalahan terhadap Negara);

(ii) suatu kesalahan baru iaitu menjadi anggota kumpulan pengganas diwujudkan di bawah Bab IVB iaitu (Kesalahan yang berhubungan dengan keganasan) dan;

(iii) dua kesalahan baru di bawah Bab baru IVB mengenai jenayah terancang.

[53] There is little dispute that that given the Hansard as referred to above, the intention was to categorise offences under Chapter VIB, and not IVB of the Penal Code, as recorded above, to be subject to SOSMA so as to widen its reach to encompass organised crime.

[54] However, this does not legitimise a situation where the right to bail though prima facie made available to certain categories of persons under sub-s (2), is then made subject to the absolute discretion of the PP merely because they subjectively are of the view that bail ought to be refused due to national security concerns.

[55] While, there may be valid situations where the dictates of national security may warrant a denial of certain rights, the principle of check and balance in a system of constitutional supremacy and where the doctrine of separation of powers prevails, must be effective enough to exclude any form of arbitrariness.

[56] There cannot exist a situation where the mere incantation of the phrase national security can without more be used as an imprimatur to validate denial of basic rights without any inquiry as to its legitimacy.

[57] There must be some degree of a descent into the specifics of how and why it is contended that a particular matter is affected by national security by way of affidavit evidence. See the per curiam observations in the House of Lords case of *Secretary of State for Defence and another v Guardian Newspapers Ltd* [1985] AC 339 to this effect. This sadly has not been the case here.

SECTION 13 OF THE SOSMA AND THE HANSARD

[58] I am well aware of the Hansard specifically relating to the enactment of s 13 which was referred to in *Public Prosecutor v Lee Ngan Chea* [2015] 6 CLJ 117, along with the conclusion of the court as follows:

> [19] Mahkamah ini telah meneliti Penyata Rasmi Parlimen Dewan Rakyat, Parlimen Kedua Belas, Penggal Kelima, Mesyuarat Pertama Bil 20, 17 April 2012 (Selasa). Mahkamah ini telah meneliti perbahasan yang dikemukakan oleh YB Dr M Jeyakumar Devaraj (Ahli Parlimen Sungai Siput) (YB itu) dan nampaknya YB itu telah pun menzahirkan kebimbangannya kesan s 13 Akta itu semasa ianya dibahaskan di Dewan Rakyat. YB itu berpandangan berkaitan kuasa jaminan,

Parlimen tidak memberikan budi bicara jaminan kepada mahkamah sebaliknya kepada Pendakwa Raya. Mahkamah ingin memetik perbahasan tersebut sebagaimana berikut: A

Fasal 13 ini adalah berkaitan dengan bail atau jaminan kepada orang yang dituduh, atas sesuatu kesalahan keselamatan. Apa yang diberikan di dalam akta ini ialah kuasa untuk membuat keputusan, bolehkah orang itu diberikan jaminan, bukan pada hakim. Ini dikatakan tidak boleh diberikan untuk beberapa kumpulan tertentu di bawah 18 tahun seorang perempuan, Pendakwa Raya boleh syorkan. B

[20] YB itu dalam nada sinisnya menyatakan:

> ... So kita telah mengambil kuasa untuk mempertimbangkan isu itu daripada hakim dalam akta ini dan beri-tidak ada sesiapa. Sekiranya dia di 'charge', tidak ada jaminan. C

[21] YB itu yang dilantik oleh pengundi bagi mewakili suara rakyat di Parlimen cuba mencadangkan fasal 13 (sekarang s. 13) dipinda dan memberikan budi bicara kepada mahkamah untuk menentukan jaminan. Mahkamah ini amat tertarik dengan idea YB itu dan izinkan memetik cadangan YB itu sebagaimana berikut: D

> So, ini satu yang heavy handed, dengan izin. It ties the hands, ini ikat tangan hakim. Jadi apa yang disyorkan ialah fasal 13 digantikan dengan perkataan seperti berikut, 'Jaminan boleh diberikan kepada seseorang yang dituduh atas suatu kesalahan keselamatan jika hakim berpuashati risiko keganasan terhadap orang atau harta dapat dikawal oleh sekatan terhadap orang yang dituduh seperti peranti pengawasan elektronik, perampasan passport, pendeposit wang jamin dan kewajipan melaporkan diri dengan pihak polis secara berkala hingga kes terhadapnya diputuskan'. So, jadi ini boleh memberi satu kuasa kepada hakim untuk membuat keputusan itu, the judicial review again. I think it is good for the acts. I hope you consider it. Terima kasih. E F

[22] Mahkamah ini berpendapat niat Parlimen dalam menggubal s 13 Akta itu dapat dilihat daripada ucapan YB Dato' Seri Mohamed Nazri Abdul Aziz yang telah membezakan 'kesalahan keselamatan' dengan 'criminal offences' bagi tujuan jaminan. Mahkamah ini memetik kata-kata beliau sebagaimana berikut: G

> Tuan Pengerusi, saya amat memahami apa yang dimaksudkan oleh Yang Berhormat daripada Sungai Siput tetapi daripada awal lagi saya sudah mengatakan iaitu bahawa mereka yang dituduh di atas kesalahan di bawah rang undang-undang yang sedang kita bahaskan ini, ia merupakan kesalahan keselamatan yang cukup serius. Jadi ia tidak boleh dilihat daripada segi keadaan biasa. Saya sebutkan sebentar tadi iaitu dalam keadaan biasa, 'criminal offences' dibolehkan tetapi ini kesalahan keselamatan, very serious. H

[23] Mahkamah ini turut menimbangkan ucapan YB Dato' Seri Mohamed Nazri Abdul Aziz dan menolak cadangan pindaan yang dikemukakan oleh YB Sungai Siput. Beliau menoktahkah perbahasan fasal 13 dengan kata-kata berikut: I

> ... Oleh sebab itu saya ingin menyatakan di sini iaitu kita mahu supaya fasal 13 dikekalkan seperti sedia ada dan kita tidak bersetuju dengan pindaan yang dicadangkan oleh Yang Berhormat Sungai Siput.

A [24] Mahkamah ini setelah meneliti Hansard semasa membahaskan rang undang-undang terutamanya fasal 13 (sekarang s 13), niat Parlimen hanya membenarkan jaminan dalam keadaan yang dinyatakan di bawah s 13(2)(a), (b), (c) Akta itu dan ianya terpulang kepada Timbalan Pendakwa Raya untuk memohonnya dengan syarat pemasangan peranti pengawasan elektronik. Mahkamah ini berpendapat dalam keadaan undang-undang yang ada sekarang, mahkamah ini tidak mempunyai budi bicara untuk membenarkan permohonan jaminan oleh OKT berdasarkan peruntukan s 13(2)(c) 'seorang yang sakit atau seorang yang uzur' sebagaimana yang cuba dihujahkan oleh peguam OKT yang terpelajar.

C [25] Mahkamah ini bersetuju dengan hujahan peguam OKT yang terpelajar iaitu berpandukan fakta usia OKT ianya termasuk dalam 'seorang yang uzur'. Mahkamah ini menyerahkan kepada kebijaksanaan TPR yang terikat dengan peruntukan pemasangan peranti pengawasan elektronik yang buat masa ini belum digubal dalam KTJ.

D [26] Mahkamah ini berpendapat dalam kes *Manickam & Ors* ianya melibatkan kesalahan biasa atau dalam konteks perbahasan YB Dato' Seri Mohamed Nazri Abdul Aziz kesalahan s 395 Kanun itu termasuk dalam 'criminal offences' yang boleh dijamin. Sebaliknya kesalahan yang dilakukan oleh OKT termasuk dalam 'kesalahan keselamatan' dan ianya secara jelas membataskan budi bicara mahkamah dalam hal jaminan melainkan TPR yang terpelajar tertakluk kepada peranti pengawasan elektronik. Mahkamah ini berpendapat dalam kes *Manickam & Ors* ianya merungkai persoalan budi bicara mahkamah ini di bawah s 388 dan s 389 KTJ yang membenarkan jaminan.

F [27] Kesimpulannya, berdasarkan alasan-alasan yang dihuraikan di atas, mahkamah ini berpendapat peruntukan di bawah s 13(2) Akta itu tidak memberikan budi bicara kepada mahkamah ini untuk membenarkan permohonan jaminan atas OKT yang menghadapi 'kesalahan keselamatan'. Walaupun begitu, mahkamah ini bersetuju OKT termasuk dalam 'seseorang yang uzur' berpandukan usianya bagi maksud peruntukan s 13(2)(c) Akta itu. Parlimen telah memberi budi bicara kepada TPR dalam hal jaminan sebegini dan tertakluk kepada pematuhan peranti pengawasan elektronik yang ditetapkan dalam KTJ.

[59] It is clear that from the Hansard references that the intention of s 13 was to tie the hands of the court and place the sole discretion with respect to the H grant of bail in the hands of the PP. However, Hansard is not the only aid to statutory interpretation as demonstrated above. Therefore with the greatest of respect, I am unable for the reasons given, to accede to the conclusions as stated in the above case.

I WORDINGS IN S 13 IMPLIES A DISCRETION

[60] The use of the phrase '*may* be released on bail' which indicates a clear discretion with specific reference to the categories of persons in sub-s (2) and the specific exclusion of offences under Chapter VIA of the Penal Code

(Act 574) and the Special Measures Against Terrorism in Foreign Countries Act 2015 (Act 770) from the right to bail gives further impetus to the argument that the court and not the PP is vested with discretion to grant bail.

GENERAL APPLICABILITY OF THE PRINCIPLE IN SEMENYIH JAYA

[61] Although the particular facts in *Semenyih Jaya* concerned certain sections in the LAA, the underlying principle enunciated therein is that any legislation that purports to remove from the courts the power or discretion to exercise a certain right and place it in the hands of non-judicial personages cannot be countenanced as this would be inimical to the doctrine of separation of powers.

DECISION IN RESPECT OF THE INTERPRETATION OF S 13 OF THE SOSMA

[62] I therefore hold that pursuant to s 13 of the SOSMA, the courts are vested with the discretion to decide whether to grant bail or not, to any of the classes of persons enumerated in sub-s (2).

[63] If such discretion is exercised to grant bail, the court can then impose whatever conditions of bail deemed fit including (when such provision in s 388A of the CPC does eventually come into force) considering an application from the PP for the attachment of the EMD. Should the PP decide not to apply for the EMD, the court can nevertheless proceed to grant bail on whatever other terms and conditions.

[64] This interpretation is also consonant with the principle that a man is innocent until proven guilty and that that in interpreting a penal provision any doubt therein should be given to the accused person. See *Hari Bhadur Ghale v Public Prosecutor*.

MERITS OF THE APPLICATIONS

[65] All that now remains is for the court to decide whether on the facts and merits of each application, there is sufficient material before the court to grant bail. Each applicant's application will now be examined in turn.

CRIMINAL APPLICATION NO JA-44–51–07 OF 2018 (JIMMY SEAH THIAN HENG)

[66] The applicant avers that he suffers from chronic anxiety and depression for many years. He also states that he had been treated at the KPJ Johor Specialist Hospital for the following ailments:

A (a) diabetes mellitus;

(b) hyperlipidaemia;

(c) hypertension;

B (d) gastritis; and

(e) anxiety depression.

C **[67]** This was also supported by an affidavit by Dato Dr Singraveloo Muthusamy who is the physician treating the applicant for the last 14 years at the KPJ Johor Specialist Hospital.

[68] It is however emphasised by the applicant that the main concern among these conditions is his anxiety depression, which the applicant says he has been D receiving treatment for over 12 years.

[69] To this end, the said Dato Dr Singraveloo Muthusamy in his affidavit averred that the 'anxiety depression' suffered by the applicant requires treatment and care of a prolonged nature.

E

[70] The attached medical reports by Dato Dr Singraveloo Muthusamy annexed as 'DV1' and 'DDV2' in addition to confirming his list of medical ailments also stated that his continued incarceration may result in a high chance of suicide.

F

[71] There were also other allegations of assault and abuse while he was in detention. Aside from the medical aspects, these allegations along with other allegations regarding the circumstances in which the raid on his business premises and his arrest was carried out, is not strictly speaking within the scope G of consideration by this court in considering this bail application.

[72] The mental state of the applicant was also supported by way of an additional affidavit by one Fung Ka Siong who states that he is a prison cellmate H of the applicant. This affidavit states inter alia, that the applicant has displayed the following abnormal behaviour in the prison cell:

(a) talking to himself and to the wall;

(b) showing signs of severe anxiety and signs of what the deponent says is I some form of mental breakdown;

(c) difficulty falling asleep and frequently wakes up during the night;

(d) constantly screaming while asleep; and

(e) keeping to himself in the corner of the prison cell.

[73] The affidavit in reply to the applicant's affidavit in support did not specifically rebut or challenge the applicant's assertion that he suffers from the list of ailments set out above nor does it rebut the assertion that the applicant suffers from 'anxiety depression' save to state that they had no knowledge of these matters.

[74] In that regard there is no rebuttal to the averments made by the applicant that he suffers from the ailments complained of. It is trite that unrebutted allegations are usually deemed to be admitted. See *Ng Hee Thong & Anor v Public Bank Bhd* [1995] 1 MLJ 281.

[75] From a perusal and consideration of the medical reports exhibited, the applicant would qualify as a sick person within the meaning of sub-s (2). There is also the aspect of his mental condition which is accompanied by suicidal tendencies. Under the circumstances, it is in his best interests if he is freed on bail in order to receive the necessary treatment.

[76] The contention that the mental condition of the applicant does not fall within the meaning of a 'sick or infirm' person under sub-s (2) cannot be sustained.

[77] In *Chow Lin Choy lwn Pendakwa Raya* [2010] 9 MLJ 813, albeit under the provisions of s 388 of the CPC (which also contains the phrase 'sick or infirm'), the accused who was charged under s 8 of the Firearm (Increased Penalty) Act 1971 and s 8 of the Arms Act 1960, and suffered from various illnesses including being a mental patient, was granted bail. See also *Zareefa v State* 2004 CriLJ 4088.

[78] In any event, the applicant would qualify as being 'sick' on account of the list of the physical illnesses he is suffering from.

[79] I therefore allow the application for bail on the following terms:

(a) bail is set at the sum of RM20,000 in two sureties;

(b) the applicant is to surrender his international passport to the court; and

(c) the applicant is to report himself to the nearest police station to his place of usual residence once in two weeks.

CRIMINAL APPLICATION NO JA-44–44–05 OF 2018 (LIM HENG KIAW)

[80] The applicant filed an affidavit in support in which exhi LHK1 is a letter from Dr Yip Kong Yake of Regency Specialist Hospital dated 7 March

2018. In this exhibit, the said doctor who examined and treated the applicant confirmed that he had attended to the applicant on the 30 September 2015 for both eyes for cataract as well as for glaucoma.

[81] The doctor had performed the right eye cataract surgery on the 1 October 2015 and the left eye cataract surgery on the 22 October 2015. The abovenamed doctor further confirmed that the applicant has glaucoma and that it is a blinding condition that requires lifelong medication.

[82] Exhibit LHK2 in the affidavit in support is a letter from Dato' Dr Yoong How Fee of KPJ Puteri Specialist Hospital dated 12 February 2018. In this exhibit, the said doctor who examined and treated the applicant confirmed that the applicant had prostate enlargement since 2012.

[83] The doctor has stated that the applicant has difficulty in passing urine due to prostate enlargement and large bladder stone. The applicant has undergone endoscopic resection of prostate and removal of bladder stone on 2 October 2014. Subsequently, the doctor further advised follow up with blood test every six months.

[84] Exhibit LHK3 is a laboratory report of the applicant prepared by Dr Ng Suan Thoong of Klinik ST Ng dated 7 November 2017. At p 3 of 5 of the said report, under the 'tumour markers' heading, it shows that the applicant's PSA reading is at 9.21ug/L where the optimum level is supposed to be under 4.10ug/L.

[85] It will be noted that apart from the admission by the respondent that the applicant has eye cataract and glaucoma, the respondent had averred that they have no knowledge of the other ailments complained of by the applicant.

[86] In that regard there is no rebuttal to the averments made by the applicant that he suffers from the ailments complained of. It is trite that unrebutted allegations are usually deemed to be admitted. See *Ng Hee Thong & Anor v Public Bank Bhd*.

[87] From a perusal and consideration of the medical reports exhibited, the applicant would qualify as a sick person within the meaning of sub-s (2). His advanced age of 68 years is further support for the fact that his condition requires close and regular monitoring.

[88] I therefore allow the application for bail on the following terms:

(a) bail is set at the sum of RM20,000 in two sureties;

(b) the applicant is to surrender his international passport to the court; and

(c) the applicant is to report himself to the nearest police station to his place of usual residence once in two weeks.

CRIMINAL APPLICATION NO JA-44–39–04 OF 2018 (NG SOON KIAT)

[89] The applicant here is 60 years of age. His medical records reveal that he suffers from chronic diabetes, eye complications and kidney complications. Besides this, he also has heart problems, high blood pressure, arthritis and asthma.

[90] This is supported by a medical report annexed to his affidavit in support as 'NSK2' which also recommends regular follow up with long term medication, blood tests and close monitoring to prevent full blown complication. The report concludes by appealing for the applicant to be allowed access to medical care and medication.

[91] The respondent in reply averred in opposition that the applicant may obtain medical treatment while in remand upon application to the relevant authorities.

[92] The applicant by way of rebuttal cited the case of *Public Prosecutor v Dato' Balwant Singh (No 1)* [2002] 4 MLJ 427 as follows:

> The medical report reveals that the accused is exposed to various complications arising from his current medical disabilities. They can be life threatening. He is thus a fragile person as stated in the medical report. His various medical ailments weighed with his advanced age render him weak, feeble and physically not sound. The report was not challenged by the prosecution. *The prosecution did submit on the availability of medical facilities in the prison to treat the accused. But that is not a relevant factor in making a determination on his health.* In the circumstances, it is my view that the accused is a sick and infirmed person within the meaning of the proviso to s 388(1). *He is therefore not affected by the restriction placed on* s 388(1) *and is entitled to be enlarged on bail at the discretion of the court.* (Emphasis added.)

[93] I agree that the fact that medical facilities are available in prison is not a relevant factor. As the medical report was also not challenged by the respondents, the condition of the applicant is deemed admitted. See *Ng Hee Thong & Anor v Public Bank Bhd*.

[94] From a perusal and consideration of the medical reports exhibited, the applicant would qualify as a sick person within the meaning of sub-s (2). His

age of 60 years does not assist his medical conditions and it is in his best interests given his condition that he receives long term medication and close monitoring.

[95] I therefore allow the application for bail on the following terms:

(a) bail is set at the sum of RM20,000 in two sureties;

(b) the applicant is to surrender his international passport to the court; and

(c) the applicant is to report himself to the nearest police station to his place of usual residence once in two weeks.

CRIMINAL APPLICATION NO JA-44–48–06 OF 2018 (SEOW HWEE KANG)

[96] The applicant here is 69 years of age and avers that he is lacking in strength, health and energy of a normal person, by which I take to be energy of a younger person.

[97] As a result, the applicant states that he requires plenty of rest, a controlled diet, supplements and regular medication and sufficient sleep. He also avers that he suffers from high blood pressure and blurring of his eyesight. He also states that because of his advanced age he is unable to stay in the cramped conditions in the prison.

[98] The latest medical report tendered as exh 'HSK1A' confirmed that the applicant suffers from hypertension and also now has contracted tuberculosis.

[99] The respondent has not specifically rebutted these averments made by the applicant save that it was averred that they had no knowledge of such matters. The medical condition of the applicant has therefore not been rebutted. See *Ng Hee Thong & Anor v Public Bank Bhd*.

[100] The expression 'infirm' was discussed in the Indian case of *Khagendra Nath Bayan And Anor v The State of Assam* 1982 CriLJ 2109 at p 2112 as follows:

> The proviso to s 437(1) (ours 388(1)) speaks of 'any sick or infirmed person'. 'Infirm', according to the Concise Oxford Dictionary means '*physically weak, specially, through age*'. According to Webster's New Twentieth Century Dictionary, '*infirm*' *means weak, not strong; not firm or sound physically; feeble. Infirmity is naturally concomitant with old age*. When the learned magistrate used the expression 'too old' it could not, therefore, be said that the case did not fall under the proviso. The sickness envisaged is such as results in infirmity of the person. (Emphasis added.)

[101] In *Public Prosecutor v Dato' Balwant Singh (No 1)*, it was held:

> The medical report on the accused — not challenged by the prosecution — revealed that the accused was exposed to various complications arising from various medical disabilities. *His various medical ailments weighed with his advanced age rendered him weak, feeble and physically not sound. In the circumstances the accused was a sick and infirm person within the meaning of the proviso to* s 388(1). (Emphasis added.)

[102] Similarly here, a combined consideration of the applicant's advanced age and his medical ailments, have rendered him someone falling in the category of a 'sick and infirm person' under sub-s (2).

[103] I therefore allow the application for bail on the following terms:

(a) bail is set at the sum of RM20,000 in two sureties;

(b) the applicant is to surrender his international passport to the court; and

(c) the applicant is to report himself to the nearest police station to his place of usual residence once in two weeks.

CRIMINAL APPLICATION NO JA-44–56–08 OF 2018 (CHUA KAH TAT)

[104] The applicant is 44 years of age. In his affidavit in support he avers that he suffers from 'early osteoarthritis' in both his knees resulting in him experiencing extreme pain when he stands or walks for prolonged periods of time.

[105] His medical report attached to his affidavit in support as exh 'CKT1' confirms that he has' mild narrowing of medial compartment of tibio-femoral joint spaces bilaterally with minimal osteophytes' in both knees.

[106] In addition, he avers that in his x-ray results to his pelvic region, it was discovered that he has 'left dynamic hip screw noted' and 'mild narrowing of both joint spaces'. This much is evident from the contents of exh 'CKT2' to his affidavit.

[107] According to the applicant, he was forced to use a wheelchair during a time of his detention because he was unable to walk. An x–ray performed on his lumbosacral spine confirmed that he has 'multiple anterior marginal osteophytes' to his backbone as evident in exh 'CKT3'.

[108] The applicant also states that an X-ray to his left arm reveals he suffered from 'fracture distal humerus stabilised with plates and screw' which he says can cause extreme pain resulting in inability to sleep at night. The applicant

states that if he is able to experience the comforts of the home, he can alleviate much of the pain he is now undergoing.

[109] As a result of the above the applicant states that he is a 'sick and infirm' person within the meaning of sub-s (2) and ought to be allowed bail.

[110] The complaints advanced by the applicant here is with regard to condition related to his bones and joints, some of which were due to an accident sustained by him earlier. This he states has caused him discomfort and even pain.

[111] However, it is not something that would cause him to be described as a sick or infirm person within the meaning of sub-s (2). In the circumstances, the applicants application for bail is dismissed.

Order accordingly.

Reported by Ashok Kumar